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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 192.

WILLIAM LLOYD BARNARD, JOHN W. DAILEY, CHARLES W. HUMPHREY ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

SUPPLEMENTAL MEMORANDUM OF PETITIONERS.

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INDEX

Supplemental Memorandum of Petitioners 1

The Tenth Circuit Court of Appeals Was Without Jurisdiction and Its Judgment Is Void 2

This Court Should Enter an Order Vacating the Judgment of the Court of Appeals 5

TABLE OF CASES

Carroll et al. v *United States*, 354 U. S. 394 6

Great Southern Fire Proof Hotel Co. v. *Jones*, 177 U. S. 449 5

Lion Bonding Co. v. *Karatz*, 262 U. S. 640 5

Shanferoke Coal & Supply Corp. v. *Westchester Service Corp.*, 293 U. S. 449 5

Stratton v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10 5

U. S. v. *Bitty*, 208 U. S. 393, 52 L. Ed. 543, 283 S. Ct. 396 1

U. S. v. *Hark*, 320 U. S. 531 7

U. S. v. *Hastings*, 296 U. S. 188 2-3

U. S. v. *Heinze*, 218 U. S. 532, 54 L. Ed. 1139, 31 S. Ct. 98 1

U. S. v. *Sc. ges*, 144 U. S. 310, 36 L. Ed. 445, 12 S. Ct. 609 1

U. S. v. *Wayne Pump Co.*, 317 U. S. 200 3

STATUTE CITED

Title 18, U. S. C., Sec. 3731 ..... 1, 6, 7

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SUPPLEMENTAL MEMORANDUM OF PETITIONERS.

The Government has no right to an appeal in a criminal case except as expressly permitted by the Criminal Appeals Act, 18 U. S. 3731.[1] Hence, the issue raised by peti-

[1]See *U. S.* v. *Sanges*, 144 U. S. 310, 36 L. Ed. 445, 12 S. Ct. 609, discussing the common law right of the government to appeal a criminal case. *U. S.* v. *Bitty*, 208 U. S. 393, 52 L. Ed. 543, 283 S. Ct. 396; *U. S.* v. *Heinze*, 218 U. S. 532, 54 L. Ed. 1139, 31 S. Ct. 98.

tioner's Reply Brief concerns the very *jurisdiction* of the Court of Appeals to have accepted appellate review of the Government's appeal in the first instance. Jurisdiction could have been challenged by petitioners or by the Court itself on its own motion.

The issue of jurisdiction of the Court of Appeals over the Government's appeal may, therefore, be properly considered by this Court at this time.

The Tenth Circuit Court of Appeals Was Without Jurisdiction and Its Judgment Is Void.

The first point made by the Government is that its appeal was properly lodged in the Court of Appeals because the dismissal of the indictment by the District Court was, or may have been, based on grounds other than the interpretation of the statute.

It cannot be presumed that the Court dismissed the indictment for some reason other than the grounds stated in the various motions. (See R. 100 and 113 where the Court uses the words "for the reasons stated in defendant's said motion" and "for the grounds and for the reasons stated in defendants' said motion".) All of the grounds in all of the motions involved the interpretation and application of the statute. It is true that some of the motions (R. 94, 96, 108) commence with the general statement that the indictment "does not state facts sufficient to constitute an offense against the United States." However, in each such instance the general statement is followed immediately by the allegation that the indictment is insufficient because it alleges that the contract was a "fixed-price reimbursable contract with a price redetermination clause," whereas the statute applies only to "cost plus a fixed fee or other cost reimbursable contracts." In *United States* v.

Hastings, 296 U. S. 188, it was held that the dismissal of the indictment was based exclusively on the construction of a statute. The first ground was "that said indictment failed to charge any offense against the laws of the United States." This Court said, l. c. 194:

> "* * * The first ground may fairly be regarded as not a distinct ground, or a finding of the insufficiency of the indictment as a mere matter of pleading, but as intended to be an introduction to the specifications which follow and to be read in their light. * * *"

In *United States* v. *Wayne Pump Co.*, 317 U. S. 200, cited by the Government, the motion by defendant attacked the indictment as being indefinite and uncertain in its allegations. None of the motions in the case at bar attack the *form* of the indictments.

By agreeing that the contract could be considered by the Court in ruling on the motion to dismiss the indictments, the contract became, in effect, a part of the indictment, as further clarification of the phrase "fixed-price reimbursable contract with redetermination clause" used in the indictment.

For the Government to say that the dismissal involved a finding that the indictment was insufficient, and involved an interpretation of the contract, hardly resolves the issue. No criminal statute can ever be construed by a Court unless someone is charged with its violation. The Government answers its own argument when it says (p. 5):

> "The resolution of the issue as to the applicability of the statute inevitably involves an interpretation and characterization of the contract."

This court in *U. S.* v. *Wayne Pump Co.*, 317 U.S. 200, 207, stated in that connection:

"Yet, the essence of the ruling would be based upon a construction of the statute."

When the Government appealed from the order dismissing the indictments, its "statement of points relied upon" were identical as to each of the indictments (R. 102, 115, 127, 133), and were (1) that the indictment stated facts sufficient to constitute an offense under the applicable statutes (naming them), and (2) that the contract in question was "on a cost-plus-a-fixed fee or other cost reimbursable basis within the purview of sections 51, 52, and 54, U. S. C. A., Title 41." In its brief in opposition to the petition for certiorari the Government says (p. 8) that the decision of the Court of Appeals, reversing the District Court's decision, is "correct and is based on a reasonable interpretation and application of the statute."

Furthermore, in the District Court and before the Court of Appeals, petitioners contended that when the statute involved makes criminal the kick-back practices defined therein, when "knowingly" done, such language means that the defendants must not only have knowledge of the kick-back, but also must have knowledge that the prime contract is of a type that makes the kick-back prohibited. The District Court so construed the statute. The Court of Appeals arrived at a contrary construction of the statute.

Clearly, every issue raised by defendants' motions for dismissal before the District Court, argued in the Court of Appeals and even briefed by both petitioners and respondent on this petition turns upon a construction of the Anti-Kickback Statute as applied to the contract under consideration.

This Court Should Enter an Order Vacating the Judgment of the Court of Appeals.

The Government makes an argument under the numeral "2" in which it discusses what action the Court should take if it is decided that the Court of Appeals had no jurisdiction. We must confess that it is not clear to us what the Government believes the Court should do. In the first full paragraph on page 6 it is stated that the Court cannot grant certiorari for that reason. In the next paragraph it is stated that certiorari is the *only* method by which the matter can be considered. In the footnote on page 7 it is suggested that the Court might vacate the Court of Appeals' judgment and consider this matter as if it were an appeal by the Government from the order of the District Court. Finally, on page 8 it is suggested, in effect, that the Court should forget the whole thing, deny our petition for a writ, and let the void judgment of the Court of Appeals stand.

It is the duty of the Supreme Court to determine from the record whether or not the Court below had jurisdiction, even though the question is not raised by either party at any time. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449. When it is determined that the Court of Appeals acted without jurisdiction in entertaining an appeal, the appropriate action is for the Supreme Court to reverse the decree of the Circuit Court of Appeals and remand the case with directions to dismiss the appeal for want of jurisdiction. *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10. Under those circumstances the dismissal of the appeal is the only action that can be taken. There is not even power to award costs against the defeated party. *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640.

If the Court follows the principles laid down in the above decisions, it is obvious that the judgment of the District Court is final; and has been final and unimpeachable for some time, since the time for the Government to appeal directly to the Supreme Court has long since passed. The only possible argument that could be made against this result would be based on the provision of Title 18, U. S. C., Sec. 3731, to the effect that if the Circuit Court of Appeals is of the opinion that the appeal should have been taken to the Supreme Court, it shall certify the case to the Supreme Court. The Government did not file its appeal in the Supreme Court, and the Court of Appeals did not certify the case to this Court. It would be extending the provisions of the statute to accept defendants' motion for certiorari as an appeal by the Government.

It is suggested by the Government that the Court might send the matter back to the Court of Appeals and order it to certify the case back to the Supreme Court. Taking into account the general principles applying to appeals by the Government in criminal cases, and taking into account the provisions of the statute, we do not believe that such a procedure was contemplated. The right of the Government to appeal was considered at length in *Carroll et al. v. United States*, 354 U. S. 394. It is noted that appeals by the Government in criminal cases are unusual, exceptional, and not favored; that they can arise only from the clear mandate of a statute, and that such a statute will be strictly construed and will be carefully restricted in its operations to the situations authorized by the statute.

The statute obviously contemplates that the question of certifying the case to the Supreme Court must be resolved, if at all, before a judgment is entered. The statute also provides that an appeal shall be taken within 30 days "and shall be diligently prosecuted". If the Government

can at this time assert its right to appeal to the Supreme Court, when would that right expire? If the judgment of the Court of Appeals is void, it could be attacked ten years after its entry. Could the Government at that time secure permission to appeal to the Supreme Court? If the judgment of the Court of Appeals is void, and if the Government is still permitted to prosecute its appeal to this Court, the result would be that the Government is given an extension of time in which to file its appeal. This cannot be done by this Court, nor by any Court below. *United States* v. *Hark*, 320 U. S. 531. If our interpretation of the statute is technical, then it can also be said that it is technical to set a time limit during which the original notice of appeal must be filed. All statutes granting a right of appeal contemplate that there must at some time be an end to the matter. We believe that the interpretation of Sec. 3731 suggested by the Government would mean that there is never an end to an appeal by the Government in a criminal case.

The Government is the only party having a right to appeal under the statute now under discussion, and from its every day experience, should have some idea as to where the appeal should be taken. If there is any doubt in its mind (and we think there could have been none in this case), it can protect itself by ascertaining the proper forum *before* the matter is considered and a ruling is made.

We submit that, on the record, the Court of Appeals judgment is void; that this Court should enter an order vacating that judgment and ordering the Tenth Circuit Court of Appeals to dismiss the appeal in that Court; that this Court should enter such an order without further proceedings herein. If this Court is of the opinion that the Tenth Circuit Court of Appeals *did* have jurisdiction, then

we submit that our petition for certiorari should be granted for the other reasons mentioned therein.

Respectfully submitted,

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